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No. 86-870

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S. INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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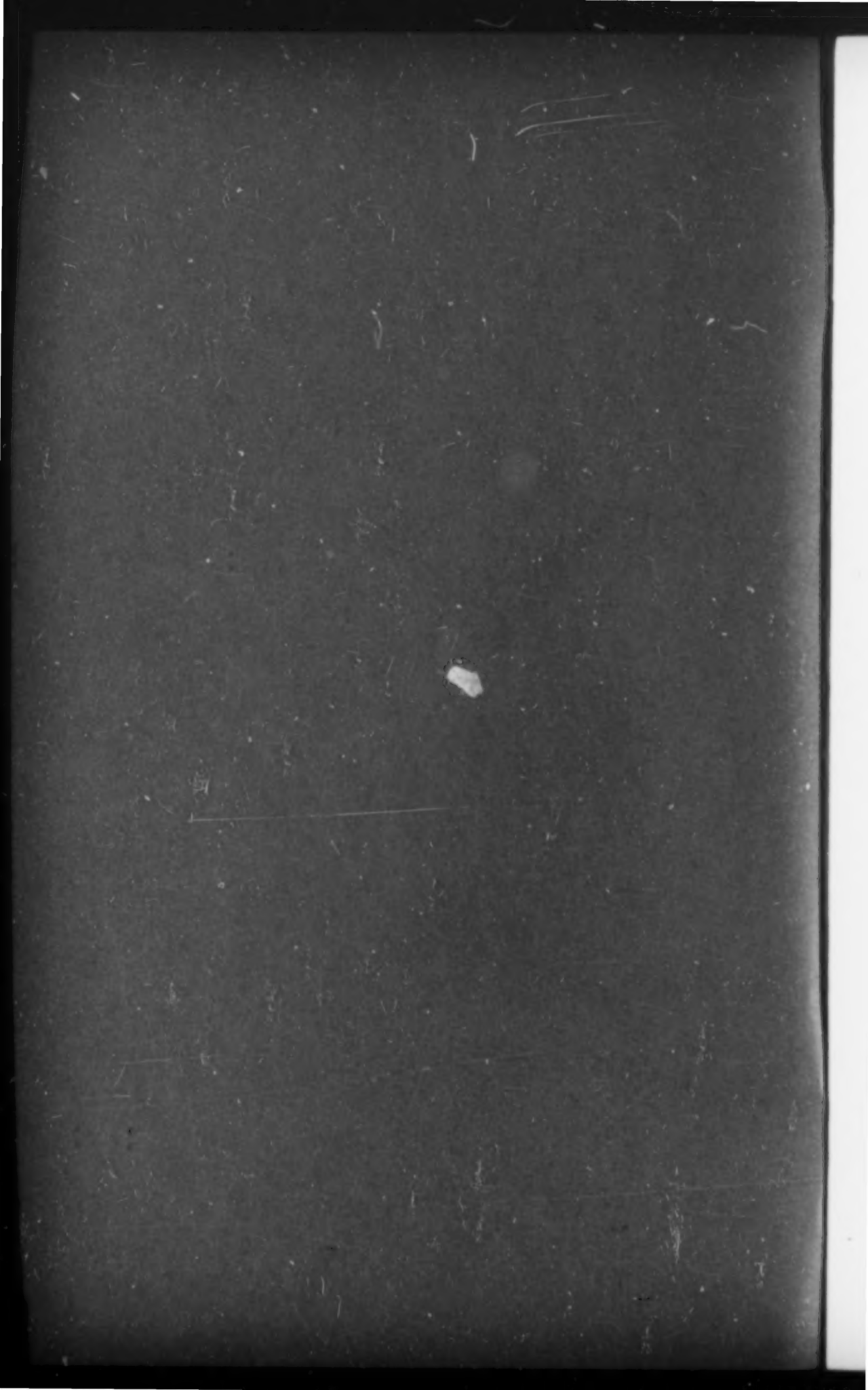

QUESTIONS PRESENTED

I. CAN THE EQUAL FOOTING DOCTRINE BE APPLIED TO LIMIT RETROACTIVELY THE SCOPE OF A STATE'S PUBLIC TRUST LANDS?

II. DOES THE PUBLIC TRUST DOCTRINE INCLUDE TIDAL WETLANDS WITHIN THE STATES' PUBLIC TRUST LANDS?

III. DOES THE EXISTENCE OF OPPOSING PRIVATE INTERESTS AFFECT THE VITALITY OF THE PUBLIC TRUST DOCTRINE?

RULE 28.1 LISTING

Saga Petroleum U.S. Inc. is a wholly owned subsidiary of Volvo North America Corporation. Volvo North America Corporation is a wholly owned subsidiary of A.B. Volvo. Saga Petroleum U.S. Inc. is a partner in Saga Products Company, a general partnership. Saga Petroleum U.S. Inc. has no subsidiaries.

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STATEMENT OF THE CASE

This action involves a question as to the ownership of approximately 2,400 acres of land in Mississippi. This land, which lies near the state's gulf coast, is subject to tidal influence. The Petitioners claim ownership of the land by virtue of certain Spanish grants. The Respondents argue that the property is embraced within the State of Mississippi's public trust lands.

The Supreme Court of Mississippi concluded that the Spanish grants had no effect, and that at the time of achieving statehood, the State of Mississippi obtained title to all lands subject to the ebb and flow of the tide up to the then mean high water level. *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (Miss. 1986). The Petitioners subsequently filed a petition for a writ of certiorari with the Supreme Court of the United States, arguing that the equal footing doctrine mandates a different result than that reached by the Supreme Court of Mississippi, and that the public trust lands properly include only land beneath navigable water (*See* Phillips Petroleum Co. and Cinque Bambini Partnership's Petition

for a Writ of Certiorari to the Supreme Court of Mississippi; hereinafter "Petition").

ARGUMENT

I. THE PETITION SHOULD BE DENIED SINCE THE SUPREME COURT OF MISSISSIPPI PROPERLY RECOGNIZED THAT IN THE PRESENT CASE, THE EQUAL FOOTING DOCTRINE OPERATED SOLELY TO GRANT MISSISSIPPI THE SAME RIGHTS TO PUBLIC TRUST LANDS THAT WERE OBTAINED BY THE THIRTEEN ORIGINAL STATES AS AN ATTRIBUTE OF SOVEREIGNTY.

The Supreme Court of Mississippi rendered its decision in the present case with a complete appreciation of the "equal footing doctrine" and its impact on Mississippi's public trust lands. That court recognized that following the accession of the original thirteen states to the sovereign rights of dominion over navigable waters and tidelands, similar rights were held in trust by the United States, to be passed to each new state upon its entry into the Union so as to give it "equal footing" with its forbears. *Cinque Bambini Partnership v. Mississippi*, *supra*, 491 So. 2d at 512.

In considering the identity of the public trust property obtained by Mississippi when it joined the Union in 1817, the court applied the equal footing doctrine and

recognized that Mississippi, like the original thirteen states, had dominion over such lands as were subject to the ebb and flow of the tides at that time, as called for by the controlling authorities of that era. *Id*. at 513-14. Having ascertained the scope of Mississippi's public trust land, as fixed in 1817, the Supreme Court of Mississippi determined that the equal footing doctrine had served its purpose, and had no further role in shaping the limits of the state's public trust land. *Id*. at 512. This conclusion finds support from decisions of the Supreme Court of the United States in the cases of *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977) and *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), which embrace the rule that the function of the equal footing doctrine ends immediately after a state is admitted to the Union.

Without refuting the soundness of the Supreme Court of Mississippi's traditional application of the equal footing doctrine, the Petitioners argue that the doctrine should be given an expanded role, operating to detach retroactively

certain public trust lands that were acquired by states upon their entry to the Union. In particular, they argue that Mississippi's trust lands should now be limited by application of the doctrine to ensure that the state's rights in public trust lands are not greater than those of the states that subsequently entered the Union. Thus, the Petitioners would have the doctrine serve to place Mississippi on an equal footing, not with the original thirteen states as traditionally called for, but with the states that followed it into the Union.

As discussed in Section II, *infra*, the Petitioners' claim that the rights of states which entered the Union when the "ebb and flow" test was the sole gauge for the scope of public trust lands are somehow greater than the rights of states which subsequently entered the Union when the test of navigability was supposedly the only test for the trust lands is unsupported by case law or other authority. Yet, even if it were true, the Petitioners' equal footing argument would be groundless. The lack of merit of the argument is revealed by the dearth of

authority mustered by the Petitioners in its support. In short, there is no viable authority indicating that the doctrine of equal footing was developed to restrict any state's rights to public trust lands after the state has obtained the land upon entry to the Union. Clearly, the phrase "equal footing" cannot be given too much emphasis in analyzing the nature of the doctrine. As new states entered the Union following the revolution, they varied widely in terms of their size and geographic features. Thus, the quantum of public trust land held by each state varied accordingly. There is, therefore, an inherent "imbalance" as to the quantity of lands obtained by the states in this manner. This result obtains regardless of whether the "ebb and flow" test or a "navigability" test is used to determine the identity of each state's public trust lands.

In support of their request for consideration of this issue, the Petitioners cite *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845), which is said to demonstrate that "this Court has deemed efforts to limit the

scope of the state-owned public trust land of such extraordinary importance as to warrant plenary consideration" (Petition at 9-10). Plainly, this authority is not relevant to the issue at hand. It seems that the only parties who seek to limit the scope of Mississippi's public trust land in this action are the Petitioners themselves; the Supreme Court of Mississippi clearly has not done so.

Since the Petitioners' contention is devoid of supporting authority, and the Supreme Court of Mississippi has applied the equal footing doctrine in a manner consistent with the decisions of this Court, the petition should be denied.

II. THE PETITION SHOULD BE DENIED SINCE THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS CONSISTENT WITH THIS COURT'S RULING THAT THE PUBLIC TRUST LAND OF THE STATES INCLUDES TIDELANDS, WITHOUT REGARD TO THE ISSUE OF NAVIGABILITY.

The decision of the Supreme Court of Mississippi in this case rests upon a sound interpretation of the scope of the public trust land that devolved upon the State of Mississippi when it entered the Union. It is well recognized that the courts of this nation adopted the English common-law doctrine that reserved to the sovereign the right to tidal waters and the lands beneath them. *See, e.g., Illinois Central Railroad v. Illinois, supra*, 146 U.S. at 435-36; *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873). Pursuant to this doctrine, the United States held the nation's tidewaters in trust for the future states, dominion over such property passing to each state upon its admission to the Union. *See Weber v. Harbor Commissioners, supra*; *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Pollard's Lessee v. Hagan, supra*. The identity of the land included within the public trust was

established at the time that the states achieved statehood. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. at 376; *United States v. Utah*, 283 U.S. 64, 75 (1931); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477 (1850). Thus, in 1817, when the State of Mississippi entered the Union, its public trust lands were identified and fixed. At that time, American courts followed the English common-law rule which defined the sovereign's trust to include land subject to the ebb and flow of the tide. *See Pollard's Lessee v. Hagan, supra*.

In light of this authority, the Supreme Court of Mississippi properly concluded that the state's trust lands included those lying under coastal wetlands that are subject to tidal action. *See Cinque Bambini Partnership v. Mississippi, supra*.

The Petitioners argue that decisions reached by this Court subsequent to Mississippi's statehood have completely supplanted the earlier "ebb and flow" test with a "navigability in fact" test. In support of this contention, the Petitioners cite authorities such as *Montana v. United*

States, 450 U.S. 544 (1981); *Illinois Central Railroad v. Illinois*, *supra*, and *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), which undeniably rely on the factor of navigability to ascertain questions regarding the scope of public trust land in certain situations.

However, the Petitioners fail to cite any authority, predating or contemporaneous with Mississippi's entry into the Union in 1817, that sets forth a navigability criterion for delineating public trust lands. Nor have the Petitioners provided any authority indicating that the "navigability" test was intended to divest from certain states land already held under the "ebb and flow" test. Indeed, the Petitioners simply fail to address the problems that necessarily arise from a construction of the public trust doctrine that operates to take from the states vast quantities of land already vested in them when they became states.

Despite the Petitioners' argument, the proper role of the factor of navigability can only be appreciated when viewed from the perspective of the courts that fashioned the equal footing doctrine (discussed *supra*, in Section I).

Plainly, the public trust doctrine, as originally formulated, offered little to the inland states with no tidal waters. The development of a navigability test, which coincided with the development of the interior of the nation, represents an expansion from the original "ebb and flow" test to provide the inland states with similar benefits of sovereignty already enjoyed by coastal states. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 375 (citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1877)).

Despite the expanded definition of public trust lands, the navigability analysis of the scope of public trust lands has not entirely replaced the "ebb and flow" test. The Petitioners suggest that, by virtue of the decisions in cases such as *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) and *Illinois Central Railroad v. Illinois*, *supra*, this Court rejected the "historical misconception" that the "public trust doctrine encompassed 'tidewaters' or lands that are subject to the 'ebb and flow of the tide,' all without regard to navigability" (Petition

at 15). Nevertheless, over forty years after the *Illinois Central Railroad* decision, this Court reiterated the validity of the ebb and flow test.

In the case of *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, *rehearing denied*, 296 U.S. 664 (1933), this Court addressed the issue of the ownership of certain tidal lands lying on the coast of California. One party to the suit claimed title to the land by way of a patent issued by the United States. The other party claimed title through a legislative grant by the state. In determining the respective rights of the parties, this Court considered the public trust doctrine, and stated that "[t]he soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such land within their borders as the original states possessed." 296 U.S. at 15.

Having recognized the superior rights of the State of California in tidelands by reason of the public trust doctrine, the Supreme Court concluded that the issue of

ownership of the land could be resolved by answering one question: "Was it upland, which the United States could patent, or tideland, which it could not?" *Id.* at 18-19.

In determining the boundary of the tidelands, the Supreme Court looked to the common-law "ebb and flow" test, the same test which was relied upon by the Supreme Court of Mississippi in the present case. *Id.* at 22-23. The Supreme Court of the United States did not consider the factor of navigability at all.

A similar reaffirmation of the inclusion of tidelands in the public trust may be found in this Court's decision in the case of *United States v. California*, 332 U.S. 19, *rehearing denied*, 332 U.S. 787 (1947). Although in that case, this Court refused to expand the scope of the public trust to include a belt of submerged land lying offshore, it did acknowledge that the soils lying beneath inland navigable waters *and* tidelands were within the trust. 332 U.S. at 36.

It should be noted that the authorities espousing the navigability analysis of the scope of the public trust

lands, such as *Montana v. United States*, *supra*; *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Scott v. Lattig*, 227 U.S. 229 (1913); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Central Railroad v. Illinois*, *supra*, and others, specifically involved inland waters and thus understandably do not utilize factors of analysis more relevant to coastal areas.

The Petitioners' misplaced reliance on the issue of navigability arises in part from their misunderstanding of the relationship between the federal government's reserved rights in the public trust lands and the scope of the trust. The Petitioners stress the importance of the application of the "navigability in fact test" in order to respect the constitutional concern underlying the public trust doctrine that it be "deemed subject to the paramount power of Congress to regulate the commerce and navigability of such waters" (Petition at 12-13).

It is well established that the states' rights in public trust lands are subject to the paramount rights of Congress to regulate commerce over such lands. *See*, *e.g.*,

Illinois Central Railroad v. Illinois, supra; *Weber v. Harbor Commissioners, supra*. The federal interest in submerged property beneath navigable waters, known as the "navigational servitude," is manifested in such legislation as the Rivers and Harbors Act of 1899, 33 *U.S.C.S.* §§ 401 et seq. (Law. Co-op. 1980 & Supp. 1986). *See also Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1209 (Ct. Cl. 1976), *cert. denied*, 449 U.S. 1011 (1980), *cert. denied*, 456 U.S. 915 (1982). As a superior interest, the navigational servitude can hardly be said to be limited or otherwise affected by the inclusion or exclusion of non-navigable tidal waters in the public trust lands. This point is well illustrated by the following passage from the case of *United States v. Appalachian Power Co.*, 311 U.S. 377, 426-27 (1940):

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [T]he authority is as broad as the

needs of commerce.

Thus, the Petitioners' suggestion that the federal rights in the lands in question will not be "respected" under the Supreme Court of Mississippi's decision in the present case is utterly without merit.

Nevertheless, federal case law pertaining to the federal interest in submerged lands does illuminate the issue at hand in one respect. A number of courts have held that "navigable waters," the primary factor in ascertaining the scope of the federal interest in submerged lands, extend from coastal ocean areas up into tidal wetlands that are not actually "navigable in fact." *See, e.g., United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (holding that the scope of the federal servitude is defined by the ebb and flow of the tide and therefore extends to include tidal marshes); *United States v. Cannon*, 363 F. Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973); *see also United States v. Weisman*, 489 F. Supp. 1331, 1340 (M.D. Fla. 1980) (in considering whether tidal

creeks are navigable, the court held that "the legal status of a determination of navigability applies laterally over the entire surface of the water body and extends shoreward to the mean high water mark"; where a tidal creek lies adjacent to a navigable river, "no inquiry is required here concerning the potential of these tidal creeks for commerce or transportation").

Thus, it is apparent that, even if the scope of public trust lands is to be determined by the criterion of navigability of waters, federal law recognizes that navigable waters extend into tidal wetlands that are not navigable in fact. The application of a navigability criterion in the present case would not alter the rights of the parties herein, as established by the Supreme Court of Mississippi, since the property in question lies under tidal wetlands, and since it would fall within the public trust under either an "ebb and flow" test or a navigable waters test.

In ascertaining the scope of Mississippi's public trust lands, the Supreme Court of Mississippi concluded that the trust included tidal wetlands. This ruling is in accord

with the authorities controlling when Mississippi became a state as well as with more recent decisions of the Supreme Court of the United States. Furthermore, the Supreme Court of Mississippi's decision mirrors that rendered by the Supreme Court of New Jersey in the case of *City of Newark v. Natural Resources Council*, 82 N.J. 530, 414 A.2d 1304 (sovereign ownership based on tidal flow, irrespective of navigability, has been and continues to be the rule in New Jersey), *cert. denied*, 449 U.S. 983 (1980). In light of the overwhelming support for the Supreme Court of Mississippi's approach in this case, and the corresponding lack of authority for that of the Petitioners, the petition should be denied.

III. THE EXISTENCE OF COMPETING INTERESTS CANNOT JUSTIFY THE ABANDONMENT OF THE PUBLIC'S RIGHTS UNDER THE PUBLIC TRUST DOCTRINE.

As the Mississippi Supreme Court stated, "great public interests and neither insignificant nor illegitimate private interests are present and in conflict, [nevertheless] this in the end is a title suit." *Cinque Bambini Partnership v. Mississippi*, *supra*, 491 So. 2d at 510. These conflicts are not irreconcilable, as evidenced by the court's opinion.

The existence of the public trust ownership is a fact which the alleged purchaser of tidelands may be expected to weigh when attempting to purchase such lands, and, when the state exercises its long-held title to such lands, it has hardly frustrated the justifiable expectations of the alleged owners. Nor is it reasonable for purported owners to complain that public trust rights in these lands have largely lain dormant for many years.

The principal objects of public trust ownership are the maintenance of navigation, ports, free passage, commerce, fishing, sand and stones, seaweed and shells,

recreation, conservation and aesthetics, and other important public interests. When common-law principles within the state established the existence of such ownership in 1817, alleged purchasers of public trust lands were subject to the exercise of the trust ownership at any future date.

The coastal zone, with its biological and mineral resources and recreational and aesthetic values, is not a limitless resource. It must be protected and used in a manner that will ensure that resources are not misallocated. Thus it is clear that the general public, as owners of the tidelands pursuant to the public trust doctrine, has a vital interest in the coastal zone. Although the rights of the general public may be in conflict with those of private littoral owners, such conflict is capable of just resolution by the courts, as amply demonstrated by the decision of the Mississippi Supreme Court in the present case.

CONCLUSION

The Supreme Court of Mississippi's decision is consistent with this Court's rulings regarding the public trust and equal footing doctrines, and since no conflict between the circuits is presented by this case, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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